



news flash

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CROSS BORDER MERGERS

The Ministry of Corporate Affairs (“MCA”) has recently notified the provisions of the Companies Act, 2013 (“**the Act**”) and the Companies (Compromise, Arrangements and Amalgamation) Amendment Rules, 2017 (“**Merger Rules**”) pertaining to merger or amalgamation between an Indian company and a foreign company (“**Notification**”).

Earlier Position

The Companies, Act, 1956 provided that a foreign company could merge with an Indian company. However, an Indian company could not be merged with a foreign company. This was intended to ensure that the company that continues after the merger is an Indian company and the Indian regulatory authorities can continue to exercise control on such entities.

Revised Position

Pursuant to the above notification, the merger or amalgamation of a foreign company and an Indian company and vice versa shall take place as follows:

(a) Foreign company

A foreign company (i.e. company or body corporate incorporated outside India whether having a place of business in India or not) can merge with an Indian company provided that-

- Section 230 (Power to compromise or make arrangements with creditors and members), section 231 (Power to Tribunal to enforce compromise or arrangement) and section 232 (Merger and amalgamation of companies) of the Act are complied with,
- prior approval of Reserve Bank of India (“**RBI**”) is obtained, and
- the concerned company files application with National Company Law Tribunal (“**NCLT**”) in accordance with section 230 to 232 of the Act, as stated above, after obtaining RBI approval.

(b) Indian company

An Indian company (i.e. a company incorporated under the Act or under any previous company law), can merge with a foreign company provided that –

- the foreign company is in any of the jurisdictions specified below,
- prior RBI approval is obtained,
- section 230 to 232 of the Act, as stated above, are complied with,

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May 2017

- the transferee company ensures that the valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and also such valuation is in accordance with the internationally acceptable principles of accounting and valuations and a declaration to that effect is filed with the RBI,
- the concerned company files application with NCLT, in accordance with section 230 to 232 of the Act, after obtaining RBI approval.

The Notification provides that an Indian company can merge with companies in the following jurisdictions:

- (i) a jurisdiction whose securities market regulator is (a) signatory to the International Organisation of Securities Commission's Multilateral Memorandum of Understanding, or (b) signatory to the bilateral Memorandum of Understanding with Securities and Exchange Board of India; *or*
- a jurisdiction whose central bank is a member of the Bank for International Settlements; *and*
- a jurisdiction which is not identified in the public statement of Financial Action Task Force (“**FATF**”) as:
 - (i) a jurisdiction having strategic ‘*Anti-Money Laundering or Combating the Financing of Terrorism*’ deficiencies to which counter measures apply; or
 - (ii) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies.

Conclusion

The Notification of the provisions on cross border mergers is a welcome development from MCA. Cross border mergers will present an additional structuring opportunity for undertaking corporate transactions in an efficient and flexible manner. However, considering the involvement of multiple agencies and laws, the timelines and implementation will have to be calibrated in order to achieve the commercial objective.

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